NTSB Order No.
EM-103

UNITED STATES OF AMERICAN
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 16th day of December, 1983

JAMES S. GRACEY, Commandant, United States Coast Guard,

v.

GREGORY JAMES HODGMAN, Appellant.

Docket No. ME-97

OPINION AND ORDER

This appeal seeks Board review of a decision of the Commandant (Appeal No. 2303, dated April 22, 1983) affirming an order issued by Administrative Law Judge Michael E. Hanrahan on February 3, 1983.[1] By that order the law judge revoked appellant's merchant mariner's document (No. 267-19-1477) on his plea of guilty to the charge that he had been convicted of a narcotic drug law violation by a federal court in Georgia in May, 1977.[2] The Coast Guard has filed a reply brief opposing the appeal.[3] For the reasons that follow, we will sustain the Commandant's decision.

Appellant's conviction under 21 U.S.C. §841(a) (1) reflects

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[1] Copies of the decisions of the Commandant and the law judge are attached to this Opinion and Order.

[2] Under 46 U.S.C. §239b, the Commandant has discretionary authority to revoke the documents of a seaman who has, within the preceding 10 years been convicted of a narcotic drug offense in certain courts of record.

[3] Subsequent to the filing of the parties' briefs on this appeal, the Board was advised, by an August 29, 1983 Addendum to appellant's brief, that the Commandant had determined, pursuant to the procedures in 46 CFR §5.13, that a new merchant mariner's document should be issued to the appellant. It is asserted in the Addendum that appellant "is entitled to have the Decision of the Commandant affirming the revocation of Appellant's document vacated, notwithstanding the Commandant's granting of clemency" (id. at 2).

his involvement in a criminal conspiracy with at least 18 others to smuggle into the country over 8 tons of marijuana.[4] It is against this background that the claim that the Commandant should not have revoked appellant's document under a statute designed to reach drug trafficking must be evaluated.

Appellant contends that the law judge should have dismissed the case for the Coast Guard Investigating Officer's asserted failure to follow published criteria in determining to prefer the charge herein.[5] We find no merit in the contention. While it appears that a decision not to proceed would have been consistent with some of the criteria in the Manual in that the conviction involving marijuana had not occurred within the preceding year and there were no other drug-related offenses on appellant's record, the decision to proceed was consistent with the criteria relating to a conviction involving trafficking rather than simple possession.[6] In these circumstances, it makes no difference that the investigating officer may have had discretion not to prefer charges. Absent some contrary provision in the Manual, the existence of a significant criterion supporting a decision to prosecute would appear to preclude any argument that such a decision amounted to an abuse of discretion.

Much of appellant's brief concerns his view that the law judge and the Commandant have largely rejected or ignored Board precedent on the matter of sanction in cases brought under 46 USC §239b. Specifically, he points to the Commandant's interpretation that the statute only permits revocation or no sanction at all, the Commandant's assertion that the law judge is powerless to enter any sanction save revocation where a conviction of a drug offense in a court of record is proved (and the law judge's acceptance of this view), and, finally, the Board's numerous decisions to the effect that the statute does permit a sanction less than revocation. See, e.g., Commandant v. Beroud, 2 NTSB 2742 (1975). although the Board continues to so construe the statute, we do not believe this case

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[4] Based on the conviction, appellant was sentenced to a year and one day imprisonment, of which he was required to serve about 9 months, and to a parole term of 2 years, from which he was released after about 18 months.

[5] The criteria are contained in the Marine Safety Manual (CG-495), Volume 5.

[6] As to the fourth criterion, it is not clear what "probative evidence", if any, appellant may have furnished the investigating officer to demonstrate no further involvement with narcotics.

presents any occasion to reverse the Commandant for his contrary construction. More to the point, we think the appellant's contention that a conflict between the Coast Guard's decision in this case and Board precedent overlooks a critical element in our prior holdings.

The law judge's conclusion that the "evidence presented makes out a most persuasive case for extending leniency" (Decision and Order at p.9) is predicated on a showing that the appellant "has paid his debt to society and has been successfully rehabilitated" (id). Such post-conviction factors, however, have never been the focus of our review of the propriety of revocation under 46 U. S. C. §239b. Rather, the longstanding disagreement as to the meaning of the statute relates to the circumstances of the conviction itself, with the Board of the view, not shared by the Commandant, that a sanction less severe than revocation is authorized for convictions essentially based on "pretty" drug offenses. As we stated in Commandant v. Moore, 2 NTSB 2709, 2711 (1974):

> "If Congress had intended the mandatory application of the statute in all cases wherein seamen have been convicted of marijuana offenses, no matter how petty, it could simple have substituted the word 'shall' for the word 'may' [in the clause of the statute which provides that the Commandant 'may take action to revoke...'].[7]

Our more recent decision in Commandant v. Rogers, NTSB Order EM-85 (1981), further demonstrates our concern that the sanction of revocation not be disproportionate to the underlying conviction on which the administrative action is predicated. In reversing the revocation order in that case we pointed out that the record, which established appellant's state court conviction for possession of marijuana, disclosed "no facts concerning the circumstances surrounding appellant's possession of the drug, the quantity involved, or any other matter illuminative of the severity of the offense, for purposes of assessing the propriety of revocation..." (id. at 5).

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[7] See also Commandant v. Stuart, 2 NTSB 2644, 2647 (1973) ("We distinguish [Commandant v. Packard, NTSB Order EM-21 (1972) and Commandant v. Nickels, NTSB Order EM-22 (1972] where the respective convictions were for possession of marijuana and for knowing association with marijuana users. The former instance is not comparable since it involved the petty offense of possession, and the latter violation, albeit a misdemeanor, is considerably less serious than the possession offense, viewed in terms of a seaman's fitness to serve aboard American Flag vessels.")

In sum, the Board has not previously undertaken to review revocation determinations under 46 U.S.C. §239b in terms of an appellant's post-conviction conduct of circumstances. We will not do so in this case. Revocation for the drug law offense on which this proceeding is predicated is fully consistent with the statute's goal to remove drug traffickers from the merchant marine and thus clearly within the Commandant's discretion to impose. We therefore believe that while appellant's conduct after his drug conviction may have a bearing on whether a new document, on proper application, should be issued to him, such a factor should not be considered in connection with our review of the Commandant's determination to revoke appellant's original document.

Lastly, we will reject appellant's contention that the charge against him in this proceeding should have been dismissed for laches. Although the Coast Guard has not provided any explanation for the over three-year delay in bringing the charge, we see no inequity in sustaining the revocation decision where, by virtue of temporary documents and the Commandant's recent grant of clemency, the appellant has apparently had the uninterrupted benefit of the privileges secured by his revoked document during the pendency of this proceeding and has already been authorized a new document.

ACCORDINGLY, IT IS ORDERED THAT:

1. The instant appeal is denied; and

2. The Commandant's order affirming the revocation of appellant's seaman's document by the law judge, under authority of 46 U. S. C. §239b, is affirmed.

BURNETT, Chairman, McADAMS and ENGEN, Members of the Board, concurred in the above opinion and order. GOLDMAN, Vice Chairman and BURSLEY, Member, did not participate.